COPY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SPOKANE VALLEY ex rel. CHRIS ANDERLIK, Petitioner-Appellant, vs. BALLARD BATES and DUANE SIMMONS; Respondents.	Case No.: 81295-1 **PETITIONER'S CONSOLIDATED RESPONSE TO RESPONDENT'S MOTION TO STRIKE AND PETITIONER'S MOTION TO SUPPLEMENT THE RECORD**

I. IDENTITY OF MOVING AND RESPONDING PARTY

Petitioner Chris Anderlik, through her attorney Adam P. Karp, resists Respondent's motion to strike, and moves the court to permit supplementation of the record.

II. STATEMENT OF RELIEF SOUGHT

Petitioner Chris Anderlik requests that the Court deny Respondent's sought relief and grant her request to supplement the record.

III. FACTS RELEVANT TO MOTION

Mrs. Anderlik incorporates by reference the factual summary contained in *Petitioner's Brief* dated August 13, 2008. She adds the following pertinent details:

1. Mrs. Anderlik's *Petition for Citizen Criminal Complaint,* dated December 4, 2006,

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authored by her attorney Mr. Karp, notes that the petition for private prosecution commenced "[o]n behalf of **citizen Chris Anderlik of Spokane**[.]" **DCF: Pet., at 1** (emphasis added).

2. In that same document, Mr. Karp documents his efforts, on behalf of Mrs. Anderlik, to ask the prosecuting attorneys for the City of Spokane Valley and Spokane County, as well as the Spokane County Sheriff's Office, to launch a criminal investigation and prosecute the deputies – without success. **DCF: Pet., at 1-2.**

3. Mrs. Anderlik was present for both the January 22, 2007 and March 26, 2007 hearings. **RP 1/22/07 2:24-25; RP 3/26/07 2:4-8.**

4. Mrs. Anderlik's RALJ appeal specifically identified herself as the citizen criminal complainant who attempted to initiate prosecution of Ballard Bates and Damon Simmons, referencing the district court decisions. **CP 1, 5.** Her RALJ appeal brief expressly incorporated her petition for the citizen criminal complaint at the trial level, making it clear that she was exercising her rights of appeal as a citizen criminal complainant under CrRLJ 2.1(c). **CP 7:5-9.**

The superior court dismissed the RALJ appeal without once mentioning lack of standing. The thrust of the court's dismissal was that, "The Rules on Appeal (RALJ) do not provide for an appeal from CrRLJ 2.1," and Mrs. Anderlik was "not the 'State or Local Government' under RALJ 2.2(c)(1) to this action." **CP 112-113.** Indeed, the superior court said that "the petitioner is not without review," noting that Mrs. Anderlik may have relief through a writ of review or writ of mandate. **CP 113.**

IV. ARGUMENT

A. Response to Respondents' Motion to Strike and Motion to Supplement Record

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Mrs. Anderlik concedes that certain challenged portions of her reply brief are properly analyzed under RAP 9.11, not RAP 10.8. For judicial economy, she is inclined to concede to striking footnote 24 on page 25 (concerning the pro bono contributions of experts Grandin, Rollin, and Cheever), for it is ultimately immaterial to resolving this case in its present posture and would likely fail to meet the requirements of RAP 9.11. Mrs. Anderlik makes this concession, however, based on the anticipated ruling that the Respondent's claim that the district court abused its discretion in never considering the expense of prosecution will be disregarded under RAP 2.5.

Those portions not properly challenged include footnote 2 of page 2; part of that portion of the paragraph of page 11 beginning with the words "At the time of filing"; part of footnote 13; and part of footnote 24:

1. Footnote 2 of page 2 constitutes argument only and may not be stricken on that basis alone, as they either constitute argument or are supported elsewhere in the record.

2. With respect to Mrs. Anderlik's status as a local resident asserted in that portion of the paragraph of page 11 beginning with the words "At the time of filing," Mr. Karp noted that the petition for private prosecution commenced "[o]n behalf of **citizen Chris Anderlik of Spokane**[.]" DCF: Pet., at 1 (emphasis added).

3. With respect to the first sentence of footnote 13, the December 4, 2006 briefing accompanying Mrs. Anderlik's *Affidavits of Complaining Witness* outlined steps taken by her attorney, Adam P. Karp, to ask the prosecuting attorneys for the City of Spokane Valley and

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Spokane County, as well as the Spokane County Sheriff's Office, to launch a criminal investigation and prosecute the deputies – without success. **DCF: Pet., at 1-2.**

4. The second sentence of footnote 24 on page 25 is argument.

5. As to the remaining challenged portions, Mrs. Anderlik both responds to Respondent's analysis under RAP 9.11 and presently moves to supplement the record under RAP 9.11, by permitting supplementation of the record as to the following:

a. Appendix A, Declaration of Chris Anderlik;

b. The last sentence of the first full paragraph on page 2;

c. That portion of the paragraph on page 11 that begins with the words "At the time of filing" and footnote 13;

d. First sentence of Footnote 24 on page 25 (conditionally offered as stated above); Declaration of Adam P. Karp, subjoined.

B. RAP 9.11 Criteria Met

RAP 9.11(a) outlines six factors to be considered before permitting additional evidence to be taken:

> **(a) Remedy Limited.** The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

For the reasons stated below, all our satisfied.

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Examples of cases where the court have found satisfaction of the criteria include *Mansour v. Mansour*, 126 Wash.App. 1 (2004) (finding that wife's declaration and supporting document disclosing that she and her husband sold their home for $168,468.64 complied with RAP 9.11 as the trial court's decisions were based on distribution of property, spousal maintenance, and attorney fees tied to the amount realized from the sale of the house. Presumably, the amount of the sale was known prior to appeal) and *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State,* 99 Wn.2d 878 (1983) (allowing new evidence because the emergency circumstances of the case excused counsel from not presenting it to the trial court and because recognition of the evidence would serve the goal of judicial economy.)

(a)(1) *Fair Resolution*

For the first time on appeal, the Respondent has challenged Mrs. Anderlik's standing to appeal the denial of her citizen criminal complaint, without making any convincing argument that a party may possess standing at the trial level but lose it on appeal. Respondent's citation to *In re Hickson,* 573 Pa. 127 (2003) bears out the logic that petitioner who does not have standing to initiate the private complaint because he was not a victim or part of the victim's family could not, therefore, have standing to appeal denial of that petition. Mrs. Anderlik's citation to *In re Hickson,* 765 A.2d 372 (Pa.Super.2000) confirmed that a private criminal complainant with standing to seek judicial review of a district attorney's disapproval also had standing to challenge the trial court's affirmation of the district attorney's disapproval. These cases lead to the conclusion that a petitioner's standing to appeal denial of her petition turns on whether she had standing to bring the petition at all. Accordingly, the supplemental information will assist this

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Court in resolving the standing objection.

(a)(2) *Change Decision*

This provision of RAP 9.11(a) seems inapposite and should be waived, since the trial court was never faced with determining whether Mrs. Anderlik had standing. Furthermore, the superior court's order dismissing the RALJ appeal never stated that Mrs. Anderlik lacked standing or was not an aggrieved party but instead indicated she could file a writ of review or writ of mandate. However, if this Court determines that lack of standing was a basis for dismissing the RALJ appeal, then this evidence would be most germane.

(a)(3) *Excusable Omission*

Respondent argues in one breath that the State's standing challenge was "limited to Ms. Anderlik's ability to pursue an appeal[,]" at page 5:18-19, but then, after citing to no fewer than half a dozen cases, asserts that Ms. Anderlik was "on notice prior to the filing of her case that she had an obligation to provide the trial court with sufficient facts to support her standing to bring the case[,]" at 6:18-19, not because the Respondent ever raised it at the trial level, but because the court may *sua sponte* raise the issue on appeal. In Respondent conceding that Mrs. Anderlik had standing to seek the citizen criminal complaint under CrRLJ 2.1(c), and in neither it nor the district court raising the issue over the course of multiple hearings and several briefs, it strains the concept of fairness to sandbag Mrs. Anderlik by raising the issue first on appeal <u>without</u> giving her an opportunity to establish standing by supplementing the record – evidence that serves the dual purpose of proving her aggrieved status at both the inception of the litigation and on appeal.

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Respondent cites to *Timberlane Homeowners Ass'n v. Brame*, 79 Wn.App. 303, 307 (1995) as what it deems "[t]he most similar case." The case at bar differs substantially from *Timberlane* in that the Association was on notice that standing was an issue raised at the trial level by the Brames. They had the opportunity to present the certified copy including Article XI of the Declaration of Covenants, Conditions and Restrictions, a section it contends conferred standing, but failed to do so until after the matter was appealed. *Id.*, at 307. The Association did, however, manage to submit to the trial court Article VIII of the Declaration that it relies upon to also provide standing. It is with respect to this single Article XI that the court denied the RAP 9.11 motion to supplement:

> The Brames argue that the Association lacked such standing because it did not share its members' easement rights and the record contains no evidence that the members authorized the Association to sue on their behalf to protect and enforce their rights.[FN1] Although the Brames made the same argument below, the trial court made no ruling on the standing issue.

Id., at 307-308 and fn. 1

While the particulars of Mrs. Anderlik's residence and interest in the prosecution of the deputies was extant prior to the trial court's final orders in March 2007, her standing was never questioned there. Accordingly, the objection to standing was waived. The case *State v. Ziegler,* 114 Wn.2d 533, 541 (1990), cited by Respondent, illustrates how equitable considerations should be evaluated with respect to failure to introduce evidence at the trial level. In *Ziegler,* the court held that Ziegler's physician and medical record were available prior to trial yet he made no attempt to enter that evidence. Ziegler's attempt to introduce medical articles, a letter from his physician, and portion of his medical record after conviction for statutory rape was the result of

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inexcusable neglect since the evidence he tried to introduce on appeal (concerning whether Mr. Ziegler had Chlamydia, which would have been passed on to the alleged child sex abuse victim) was exculpatory in nature with respect to the crime charged and about which he had notice.

Similarly, in *LaMon v. Butler,* 112 Wn.2d 193, 199 fn. 4 (1989), the Supreme Court denied the request to supplement the record with an affidavit from the city attorney disputing the defendant's account of a conversation. This was appropriate because the plaintiffs failed to present any evidentiary material at summary judgment by which to controvert the defendant's version of her conversation with the city attorney. *Id.,* at 199. The time to solicit such an affidavit was in opposition to a summary judgment motion where the conversation itself was material to resolving the case and the plaintiffs had notice thereof.

In *Sears v. Grange Ins. Ass'n,* 111 Wn.2d 636, 640 (1988), nearly five years after the accident, the court denied Grange's request to introduce a PIP endorsement under RAP 9.11(a) to argue that an interpretation of the PIP endorsement results in an interpretation of "use" in the UIM endorsement. Had the Grange wished to make this argument at the trial level, it needed to offer the PIP policy at the same time it did the UIM one.

(a)(4) *Postjudgment Motion Remedy Inapposite*

At Respondent's behest, the issue of standing is one that must be determined prior to judgment being rendered. Accordingly, postjudgment motions in the trial court will be inapposite and moot, for if this Court does remand to the trial court, it will mean that Mrs. Anderlik had standing.

(a)(5) *New Trial Remedy Inapposite*

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Mrs. Anderlik voices the same or similar reasons as stated in section (a)(4). A new trial will not address the question of standing.

(a)(6) *Inequitable to Decide on Trial Record Alone*

Mrs. Anderlik did not inequitably "withhold these items" until this "late date" since she was never on notice from the court or Respondent or any other person that her standing to initiate the criminal complaint was at issue. The sample *Affidavit of Complaining Witness* described within CrRLJ 2.1 does not attempt to solicit facts pertaining to standing or give notice of a need to make such a showing, but instead includes:

> Following is a true statement of the events that led to filing this charge. I (*have*) (*have not*) consulted with a prosecuting authority concerning this incident.

CrRLJ 2.1(c). Mrs. Anderlik incorporated by reference Mr. Karp's detailed statement of events, with exhibits and the steps he took on her behalf to overcome prosecutorial and sheriff inaction. **DCF: Pet., Exh. 17.** Additionally, the first sentence of CrRLJ 2.1(c) does not use the word "victim," "aggrieved party," "relative of victim," or any other limiting terminology but instead notes broadly that "[a]ny person wishing to institute a criminal action alleging a misdemeanor or gross misdemeanor shall appear...."

Moreover, not once during the proceeding before Judge Derr did the prosecutor or court question her standing. This issue first arose during the RALJ appeal, at which point the trial record was closed and there was no mechanism to supplement. Mrs. Anderlik has not found a single rule within the RALJ permitting supplementation of the record. And RAP 9.11 only applies after review has been accepted, prior to a decision on the merits, which never occurred until this Court granted Mrs. Anderlik's petition for review. "The appellate court may direct that

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additional evidence on the **merits of the case** be taken **before the decision of a case on review** ...." RAP 9.11(a)(emphasis added).

C. RAP 9.11 Criteria May be Waived

Requirements for receiving new evidence may be waived to serve ends of justice. *In re Detention of Brooks,* 94 Wash.App. 716, 722-24 (1994), *rev. granted,* 138 Wn.2d 1021, *aff'd/rev'd* 145 Wn.2d 275. In *Brooks,* the court granted the State's motion to supplement the record with the Declaration of Mark Selig, Ph.D., providing additional grounds for finding a rational basis for the statutory classification regarding less restrictive alternative. "We may, however, waive the requirements of [RAP 9.11(a)] pursuant to RAP 1.2 and 18.8 to serve the ends of justice." *Id.,* at 723 (citing *Sears v. Grange Ins. Ass'n,* 111 Wn.2d 636, 640 (1988)); *see also In re Parentage of L.B.,* 155 Wn.2d 679, 687 fn. 4 (2005) (acknowledging authority to waive rules but declining as new evidence is unnecessary for purposes of review).

Even if the Court finds that Mrs. Anderlik has not technically satisfied all six criteria, it has the authority to waive some or all of the criteria to serve the ends of justice. The Supreme Court accepted review of this matter because it recognized the significance of the issues of first impression contained herein. To allow a technicality such as that urged by the Respondent to evade review would lead to an unjust result.

V. CONCLUSION

Simply because a party may raise the question of standing for the first time on appeal does not mean in any way that the adverse party was "on notice" that standing was an issue at the trial level and, thus, may not supplement the record on appeal. For the reasons stated above, the

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Court should grant Mrs. Anderlik's motion and deny Respondent's, finding that she has satisfied the RAP 9.11(a) criteria, or that they may be excused in the interests of justice.

Dated this November 10, 2008

ANIMAL LAW OFFICES

/s/ Adam P. Karp

Adam P. Karp, WSB No. 28622

DECLARATION OF ADAM P. KARP

I, ADAM P. KARP, being over the age of eighteen and fully competent to make this statement, and having personal knowledge of the matters contained herein, hereby affirm:

1. On the issue of expense, it should be noted that all out-of-state experts I solicited for this private prosecution donated their time to assist in reviewing this matter due to the heinousness of the facts involved.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this November 10, 2008, in the city of Bellingham.

/s/ Adam P. Karp

Adam P. Karp

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2008, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

[x] **Email (stipulated)**

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